No. 89-1279

In the Supreme Court of the United States

October Term, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

CLEOPATRA HASLIP, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF TRIAL LAWYERS FOR PUBLIC JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in environmental protection, civil liberties, consumer safety and employee protection. Supported by more than 750 trial lawyers throughout the United States, TLPJ is the only public interest law firm in the nation dedicated to using plaintiffs' tort law and trial law for the public good.

TLPJ strives to achieve social change and vindicate individual rights by ensuring that wrongdoers are punished for their misconduct. Most emphatically, punitive damages are a vital weapon in TLPJ's campaign for justice. Accordingly, TLPJ respectfully submits this brief in support of respondents in this case.[1]

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[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

Punitive damages are rooted deep in the heritage of the law. Indeed, the beginnings of the doctrine trace far back in antiquity to the earliest known legal code. From the Babylonians, through the ancient Hittites and Hebrews and Hindus, through the early Romans, the concept of punitive damages began to develop. In England, statutes provided for multiple damages by the thirteenth century, and common law recognized exemplary damages by the eighteenth century. In the United States, the practice of awarding such damages was solidly grounded by pre-Revolutionary days. By the 1800s, this Court was already proclaiming the law of punitive damages to be "well established" and "well settled."

Not that the doctrine was without criticism throughout its developing years. This is not surprising since punitive damages often represent the sole means by which powerful interests in society may be held accountable. For years, for decades, in some instances for a century or more, the foes of punitive damages have assailed the doctrine. Indeed, virtually all of the present day condemnations of punitive damages are well worn.

Yet today we are assaulted with assertions that the debate is different because, it is claimed, awards of punitive damages are "routine" and "skyrocketing." Even this contention is not new to the debate — nor is it true. The attack on punitive damages is politicized and well financed. But it is not backed by empirical evidence. There are only two major studies which even attempt to quantify the incidence and amounts of punitive damage awards in any comprehensive manner. Neither of these studies supports the extreme rhetoric of the debate. One of the studies is repeatedly miscited. Incredibly, the other study — which examines a greater number and more diverse jurisdictions — is not even cited in the twenty-five extensive briefs filed by or in support of the petitioner in this case.

The long tradition of punitive damages, extending through centuries of history and persevering through periodic attacks of criticisms, is a testament to the

underlying soundness, and indeed necessity, of the doctrine in our system of jurisprudence. This is a doctrine founded upon the highest of moral principles and the most basic of human sentiments. As Oliver Wendell Holmes wrote:

> [T]he various forms of liability known to modern law spring from the common ground of revenge . . . . [I]n the criminal law and the law of torts it is of the first importance. It shows that they have started from a moral basis, from the thought that some one was to blame.

O.W. Holmes, The Common Law 37 (1881).

Through punitive damages, juries are empowered as a responsible voice of societal ethics. The rights of the poor and vulnerable are vindicated, and acts of willful and outrageous misconduct are punished and deterred. In short, grievous wrongs may be righted.

ARGUMENT

I. THE DOCTRINE OF PUNITIVE DAMAGES IS ROOTED DEEP IN THE HERITAGE OF THE LAW

A. Punitive Damages Date Back to Ancient Cultures and Early English Law

The concepts underlying the doctrine of punitive damages are as old as the law itself. Indeed, one commentator has characterized the historical foundation for the doctrine as nothing short of "astounding:"

> Once it is recognized that multiple damages are merely one statutory form of punitive damages, the depth of the historical foundation underlying punitive damages becomes astounding. Multiple damages were provided for in Babylonian law nearly 4000 years ago in the Code of Hammurabi, the earliest known legal code .... They were provided for in the Hittite Laws of about 1400 B.C., . . . and in the Hebrew Covenant Code of Mosaic law of about 1200 B.C. . . . The Hindu Code of Manu of about 200 B.C. also provided for multiple damages in at least one case. . . . The very basis of early Roman civil law, beginning with the Twelve Tables of 450 B.C., was punitive in nature . . ., and several provisions in classical Roman law prescribed double, treble, and quadruple damages . . . .

Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257, 1262-63 n. 17 (1976).

In England, the first statutory provision for multiple damages appears to date back to 1275. *Id.*, at 1263 n. 18; *see also Browning-Ferris Industries v. Kelco Disposal, Inc.*, 452 U.S. ___, 109 S.Ct. 2909, 2919-20 (1989). Some commentators believe that in practice English juries were awarding punitive damages under common law principles well before the eighteenth century. *See* Owen, *supra*, at 1263 n. 19; Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1176 n. 4 (1931). In any event, by 1763 English case

law explicitly recognized "exemplary damages" in two related decisions involving actions for trespass and imprisonment. *Huckle v. Money*, 2 Wils. 206, 95 Eng.Rep. 768 (K.B. 1763); *Wilkes v. Wood*, Lofft. 1, 98 Eng.Rep. 489 (K.B. 1763).

In *Wilkes*, the court set forth the policy underlying exemplary damages in much the same terms as used today:

> Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself.

98 Eng.Rep. at 498-99.

In this early era in England, exemplary damages were awarded in a wide range of cases, including slander, seduction, assault and battery, malicious prosecution, trespass and false imprisonment. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 14-15 (1982). Yet a common thread tied together these diverse cases: the honor and dignity of the victim had been offended. As Ellis stated:

> Honor may be less highly esteemed in contemporary western society, but it was of compelling importance in the status-oriented society that typified England well into the nineteenth century.

Id. at 15.

B. Punitive Damages Were Well Established in Early American Law

From English roots, the doctrine of punitive damages was quickly transplanted to American law in pre-Revolutionary days. *Browning-Ferris*, 109 S.Ct. at 2919. As this Court stated in *Browning-Ferris*:

> [T]he practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment.

Id. (emphasis added).

As in early English decisions, the early American cases arose in diverse situations, with the common bond of an affront to the honor and dignity of the victim. Thus, one of the first punitive damages cases in the United States was an action for breach of a promise to marry. *Coryell v. Colbaugh*, 1 N.J.L. 90 (N.J. 1791). In other early cases, punitive damages were awarded for adding a large quantity of a potion to a glass of wine in a "drunken frolic," *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784), for a spit in the face, *Alcorn v. Mitchell*, 63 Ill. 553 (1872) ($1,000 awarded), and for attempting to eject a rightfully-seated passenger from a train. *Southern Kansas Railway v. Rice*, 38 Kan. 398 (1888).

By 1851, when this Court first endorsed the doctrine, these damages — called punitive, exemplary, vindictive or smart money — were already "well established" in certain actions. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). In fact, this Court noted in *Day* that while the propriety of the doctrine has been questioned by some, "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Id.* (emphasis added). The Court continued:

> By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

Id. (emphasis added).[2]

In 1885, this Court reiterated that the doctrine of exemplary damages was "settled law." *Barry v. Edmunds*, 116 U.S. 550, 562 (1885). So settled was the law, and so voluminous the precedents, that after citing numerous cases, the Court stated:

> It is unnecessary . . . further to multiply authorities on this point. The precedents are indefinite in number, and the application of the rule as uniform as the circumstances of the cases are various.

Id. at 565.

Again, in 1896, this Court repeated that the doctrine was "well settled" in certain cases. *Scott v. Donald*, 165 U.S. 58, 78 (1896). In fact, by this time the doctrine was also "settled law by nearly all state and federal courts." *Smith v. Wade*, 461 U.S. 30, 35 (1983).

II. THE ATTACK ON PUNITIVE DAMAGES IS UNFOUNDED

A. Punitive Damages Have Long Been Attacked, Without Basis, As Routine and Excessive

The current attack on punitive damages is premised in large part on assertions that a literal explosion of such awards mandates new scrutiny of this old doctrine. Yet virtually all of the legal arguments advanced in the present case were raised long ago. Even assertions of routine and excessive verdicts are at least decades old.

In many respects, the fierce attack on punitive damages — yesterday and today — is not surprising. By the mid-1800s, the use of punitive damages began to shift away from compensation for offended honor to emphasize punishment and deterrence. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L.Rev. 517, 519-20 (1957); *see also* Ghiardi

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[2] In a note accompanying the decision, citations are listed for scores of punitive damages cases involving trespass, seduction, fraud, patents, marine torts, assault and battery, false imprisonment, killing animals and obstructing a public highway.

and Kircher, Punitive Damages Law and Practice, § 1.03 (1985). Society was changing. Traditional concepts of honor and dignity became less preeminent in our culture. Large industrial and commercial entities began to command power on a national level, and a limited number of them abused that power. These powerful business interests began to be held accountable by juries, one element of society free from their political and economic influence.

And so, the modern era of scathing attacks on punitive damages commenced. By the early years of this century one commentator who questioned the propriety of the doctrine was already writing:

> This question has been so often discussed that it is becoming somewhat threadbare . . . .

Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 Harv.L.Rev. 419, 420 (1909). The author of this article proceeded to outline his criticisms, which mirrored many of the critiques offered today, including the lack of a "maximum penalty" to constrain juries. *Id.* at 421.

Similarly, in a 1930 article, Dean McCormick protested that exemplary damages "are limited only by the caprice of the jurors" and "that this want of a guiding measure leads to excess and injustice." McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N.C.L.Rev. 129, 130 (1930). As a result, McCormick complained, "The reported cases offer many interesting instances of startling large verdicts for punitive damages . . . ." *Id.* at 149 (emphasis added).[3] McCormick also commented on the frequency of punitive damage verdicts, asserting that such awards were given "constantly" and "often" and were, indeed,

[3]The article cited three verdicts as support for this statement: (1) a $50,000 verdict "seemingly" including both compensatory and punitive damages, (2) a verdict for $750 in actual and $33,333.33 in punitive damages, with the punitive award reduced to $10,000, and (3) a verdict for $318 in actual and $12,650 in punitive damages, reduced by $5,000.

"numberless." *Id.* at 136-138.[4]

At least one other author in McCormick's era also speculated — in 1931 — that punitive damages were being awarded for "inadvisedly large sums." Morris, *supra*, at 1179. This author, however, was unusually forthright in admitting that this appraisal was merely "hypothesis":

> [T]his criticism is based on hypothesis, and its value depends on the facts.

Id.

However, the facts simply did not exist at that time. Nor can the facts from decades long past be reconstructed. Systematic reporting of punitive damage verdicts was nonexistent. Attempting to analyze those verdicts which were recorded fails to present a meaningful appraisal since there is no means to evaluate the verdicts — as large or small or representative — in the context of their time. Attempting to translate recorded verdicts from long ago into present-day dollars further strains the analysis since "constant" dollars cannot bridge the schism of vastly different societies.

In short, controversy and debate have long surrounded awards of punitive damages. But the attacks — yesterday as well as today — have been based on little more than anecdotes and hyperbole.

B. Empirical Evidence Does Not Support the Current Attacks on Punitive Damages

Despite the rhetoric of the attack on punitive damages, the empirical evidence simply does not support assertions that such awards are "routine" or "astronomical" or "mind-boggling" or "skyrocketing." In truth, despite the boldness

[4]In addition, McCormick documented the vast variety of cases in which punitive had already been awarded, including assault, personal injury, false imprisonment, deceit, malicious interference with business relations, trademark infringement, nuisance, pollution of streams, interference with easements, oppressive conduct by common carriers and other public service companies, and even certain categories of contract cases. *Id.* at 136-39.

and certitude of the charges, there is little empirical data to document the incidence and amounts of punitive damage awards. Moreover, the empirical evidence that has been compiled contradicts the extreme rhetoric of the debate.

There are only two major empirical studies of punitive damages: the RAND Institute for Civil Justice ("RAND") study of jury verdicts in Cook County, Illinois and California (primarily San Francisco County),[5] and the American Bar Foundation ("ABF") study of jury verdicts in 11 states.[6] (Two much more limited studies, discussed below, are restricted to analyses of product liability cases.)

Of the two major studies, only the RAND study is cited —or, more appropriately, miscited — in the briefs filed by and in support of the petitioner in this case. Lost in the rhetoric is the remarkable finding of the RAND study that punitive damages were awarded by juries in recent years in only 2.5 percent of the trials in Cook County and only 8.3 percent of the trials in San Francisco County. RAND, at 9. Equally striking is that the median punitive damage awards were quite modest: $43,000 in Cook County and $63,000 in San Francisco County. RAND, at 15. Quite surprisingly, given the visibility as a target of attack, RAND found that personal injury cases were the least likely type of action to receive punitive damage awards. RAND, at iii.

The ABF study, which is not cited at all in the defense briefs, is more comprehensive than RAND since the data is compiled from a much greater number — and much more diverse — selection of states. Overall, ABF found that in the

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[5] Peterson, Sharma & Shanley, *Punitive Damages: Empirical Findings* (RAND R-3311-ICJ) (1987).

[6] Daniels and Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards*, American Bar Foundation Working Paper #8705 (1988) ("ABF" 1988"); Daniels and Martin, *Myth and Reality in Punitive Damages*, American Bar Foundation Working Paper #8911 (1990), to be published in 75 Minn.L.Rev. No. 1 (Oct. 1990) ("ABF 1990"). The ABF study was first published as preliminary findings in 1986. Daniels, *Punitive Damages: The Real Story*, ABA Journal 60 (Aug. 1, 1986).

early 1980s only 4.9 percent of jury verdicts included an award of punitive damages. ABF 1990, at 34. Moreover, in the vast majority of jurisdictions, the median punitive damage verdict was less than $40,000. ABF 1990, at 43.

Given this modest and rather neutral evidence, it is only by manipulation of selected, out-of-context statistics that empirical data is converted into a weapon in a highly politicized debate. Two of the methods used to manipulate — and exaggerate — the data are simple but exceedingly deceptive.

One technique is to focus on percentage increases. When the raw numbers are very small, as with punitive damages awards, even modest increases can be converted to rather dramatic statistics. For example, as noted above, punitive damages were awarded in only 2.5 percent of recent trials in Cook County, according to RAND. This hardly seems cause for alarm. But, because the numbers are so small, this translates into an increase of 2,500 percent from the early 1960s. *See* RAND, at 9.

A second method of manipulation is to focus on average awards, instead of medians. The average is the total of all awards, divided by the number of cases, "so it can vary greatly with the addition or deletion of one or two very large awards." RAND, at 17. In the punitive damages analysis, the average is a particularly misleading statistic because a small number of aberrational awards greatly skew the average. (These exceptional awards are almost always reduced in post-trial activity). The median, however, is the amount in the middle: smaller than half the awards and larger than the other half. Accordingly, the median is not dramatically affected by a few exceedingly large awards. For this reason, the authors of the ABF study concluded that "as a technical matter the median is more appropriate"

for analysis of punitive damage trends. ABF 1990, at 41.[7]

With this background, the following is a brief review of the empirical studies.

1. *American Bar Foundation*

The American Bar Foundation studied 25,627 jury verdicts in 11 state courts in 47 counties for the years 1981-85.[8] The states were selected to represent different geographical regions, different size and socio-economic make-ups (including large urban centers, middle-sized cities, suburban areas, industrial, commercial and financial centers and a few agricultural areas) and different legal systems. ABF 1988, at 4; ABF 1990, at 33.[9]

Although this is a far more diverse group of jurisdictions than studied by RAND, the authors of the ABF study still cautioned that the study is not a representative sample of all jurisdictions in the country but reflects "a combination of regional balance and available source materials." ABF 1990, at 32.

The ABF study concluded that "the percentage of verdicts which included a punitive damage award was generally quite modest," with punitive damages awarded in 4.9 percent of all money damage jury trials. ABF 1990, at 34. The study stated:

> Contrary to the rhetoric of the reformers, punitive damage awards were not routinely awarded during the early 1980s in the sites we examined . . . . Equally as important is the finding of substantial variability among the sites, suggesting the futility of assertions about consistent national patterns.

ABF 1990, at 35.

As for the size of verdicts, the ABF study found that in most jurisdictions "the typical (median) punitive damage award is not at a level that is likely to 'boggle the mind.'" ABF 1990, at 43. More specifically:

> Fifteen of the twenty sites with more than 10 punitive damage cases during the five year period covered by our data had median punitive damage awards below $40,000, and all five of the sites with higher medians are in California. Thirteen of the sites had median punitive damage awards below $30,000. The higher medians for the California sites do suggest, however, that there may be a few places where punitive damage awards are relatively high. Nonetheless, the general pattern is one of low to modest awards.

ABF 1990, at 43. Not only are these amounts not

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[7] The ABF study quoted from a statistics textbook, as follows:

> [T]he mean is affected by changes in extreme values whereas the median will be unaffected unless the value of the middle case is also changed . . . . We may say, then, that whenever a distribution is highly skewed, i.e., whenever there are considerably more extreme cases in one direction than the other, the median will generally be more appropriate than the mean.

ABF 1990, at 42, citing, H. Blalock, Social Statistics 69-70 (2d ed. 1972).

[8] The states included in the study were Arizona, California, Colorado, Georgia, Illinois, Kansas, Missouri, New York, Oregon, Texas and Washington.

[9] One state, Washington, does not provide for punitive damages at common law but has statutory provisions for multiple damages and bad faith damages. ABF 1988, at 4, 9.

"staggering" or "astronomical," to use two terms from the rhetoric of attack, but these are trial verdicts which may be further reduced in post-trial motions.[10]

In summary, the ABF report stated:

> In general, then, it does not appear from our data that punitive damages are routinely awarded in the sites studies, contrary to what would be expected in light of the rhetoric of crisis and reform. Nor were punitive damages typically given in amounts that would "boggle the mind." Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest. . . . Furthermore, plaintiffs were least likely to be awarded punitive damages in a case involving physical harm — even if that case involved medical malpractice or products liability . . . . The description of the punitive damages system presented here is significantly different than the one offered by the reformers, and it is not one that provides evidence of a nationwide problem.

ABF 1990, at 44.

2. *RAND*

The RAND study examined a database of 24,000 jury trials in Cook County and San Francisco County from 1960 to 1984 and all other California jurisidictions from 1980 to 1984. RAND, at 4. The extremely limited geographical diversity of the study — as well as the relatively small number of punitive damage awards — caution undue generalization. As the RAND report stated:

> It is important to emphasize that findings in this report are limited.
>
> ***
>
> The relatively small number of cases resulting in punitive damage awards during the past 25 years in both these jurisdictions prohibits sophisticated quantitative analysis.
>
> ***
>
> The report has several important limitations. First, the data describe jurisdictions in only Illinois and California. It is far from certain that their findings apply to other states where laws, legal culture and jurors might differ significantly.

RAND, at ix, 5, 6.

In words that are often quoted in attacks on punitive damages, the RAND report stated that in the major metropolitan areas studied the incidence and amount of punitive damages "increased substantially" from 1960. RAND, at iii. However, as noted above, while the percentage increase may be substantial, the current numbers are still modest.

For example, in the most recent time period studied, 1980 to 1984, punitive damages were awarded in only 2.5 percent of the trials in Cook County and only 8.3 percent in San Francisco County. RAND, at 9. In all California jurisdictions, the incidence of punitive damage awards in the same time period was only 5.1 percent. RAND, at 33. In the entire 24-year period studied, 1960 to 1984, there were only 172 punitive damage awards in Cook County and 149 in San Francisco County. RAND, at 9.

As for the size of awards, RAND found the amounts increasing but concluded that the awards were still "modest." In the period 1980-84, the median punitive damages award was $43,000 in Cook County and $63,000 in San Francisco County. RAND, at 15.[11] The report stated:

> Despite the widespread perception to the contrary, most punitive damage awards are modest. . . .

RAND, at 17.

[10] The punitive damage awards in the ABF study reflect jury verdicts and not any post-trial action (i.e. remittitur). All awards are reported in 1985 dollars. ABF 1990, at 43.

[11] Again, these figures do not account for any post-trial reductions. All amounts are stated in 1984 dollars. RAND, at 14 n. 5.

The perception of "astronomical" or "skyrocketing" awards is actually based on only a few verdicts. As RAND stated:

> Most of the total amount of money awarded as punitive damages is awarded in a few cases. Our survey of post-trial activity indicates that these large awards were frequently, but not always, reduced by settlements or judicial action.

RAND, at 65.

Some of the most striking revelations of the RAND study were in the analysis of verdicts by type of case. RAND analyzed punitive damages awards in three different types of cases: business/contract, intentional torts and personal injury.[12] One of the biggest "surprises" cited by RAND was the rarity of punitive damage verdicts in personal injury cases:

> In all the jurisdictions studied, personal injury cases, which have received the lion's share of attention in the current debate, were much less likely to result in punitive damage awards than cases involving contract disputes and intentional tort suits, which usually involve violations of civil rights.

RAND, at iii. Indeed, RAND characterized the incidence of punitive damages verdicts in personal injury cases as "quite small." RAND, at v. Punitive damages were awarded in only 1 percent of the personal injury cases in Cook County and only 2 percent of these cases in San Francisco

[12] RAND defined these catagories as follows:

> The category of business/contract cases involves claims for money damages for fraud, business torts, and unfair business practices. This category also includes certain breaches of contract that have come to be treated as torts because courts regard them as violating an implied covenant to act in good faith. Thus, the category includes bad faith claims against insurance companies, employers, and other businesses. . . . The category for intentional torts includes claims for defamation, discrimination, violations of civil liberties, and assaults. . . . The personal injury category includes negligence and strict liability, but excludes personal injuries from assaults or other intentional torts.

County in the years 1980 to 1984. RAND, at 11. The statistics for product liability cases are even more striking. As RAND stated:

> Product liability cases have been of special concern to many critics, but our analyses indicate that punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960 through 1984.

Rand, at v.

Finally, RAND conducted a limited analysis of post-trial activities, including remittiturs and settlements.[13] The study concluded:

> Because of post-trial actions, the actual impact of punitive damage awards might be somewhat less than suggested by other findings here. Total and average awards have increased in recent years because of the far greater size of the largest awards. But these extraordinary awards are the most likely to be reduced by post-trial activity.

RAND, at ix.[14] Moreover, RAND noted that most of the

[13] RAND surveyed 129 trials concluded between 1979 and 1983, receiving 68 (53 percent) usuable responses. RAND, at 26.

[14] Some opponents of punitive damages contend that high reversal rates of punitive damage verdicts demonstrate that the underlying process is "arbitrary." *See, e.g.*, Amicus Brief of the National Association of Wholesaler-Distributors, et al., at 12. At the same time, others protest that a low reversal rate illustrates that the system does not function as intended. *See, e.g.*, Amicus Brief of The Alabama Defense Lawyers Association, at 9-10. In any event, to the extent that punitive damage awards are reduced or reversed, there are several possible interpretations. The most obvious, of course, is that this documents that the system is working as intended, with trial and appellate courts serving as a check on the jury system. In addition, a penchant by courts to interfere with punitive damages verdicts may indicate a growing conservatism among the judiciary. *See* Henderson and Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L.Rev. 479 (1990) (documenting a "revolution" in pro-defense decisions in product liability actions).

reductions in awards came not from judicial action but from post-trial settlements. RAND, at 28.

3. *General Accounting Office*

The General Accounting Office ("GAO") study, published in September 1989, reviewed only a limited number of product liability cases. General Accounting Office, *Product Liability: Verdicts and Case Resolution in Five States* (1989). GAO analyzed 305 product liability trials from 1983 to 1985 in five states: Arizona, Massachusetts, Missouri, North Dakota and South Carolina.

Punitive damages were awarded in 23 of the cases. GAO, at 3. Among the five states, the rate of punitive damages awards varied substantially, as did the size of the awards. GAO, at 29. The punitive damage verdicts ranged from $500 to $7 million, for a median award of $400,000. GAO, at 29. The GAO study concluded:

> Consistent with previous research, the incidence and size of punitive damages varied considerably across states. In two states, punitive damage awards were negligible. In contrast, the incidence of such awards in the three other states was high relative to the rate of such awards reported for other jurisdictions. Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases.

GAO, at 31.

The GAO study noted that, despite widespread assertions of a crisis, much of the empirical information necessary to assess the tort reform debate may be available only to the insurance industry. GAO suggested that states mandate disclosure of this information:

> Our experience in this study confirms that data with which to assess the effects of tort reforms are not readily available. The data contained in courts records or the files of attorneys are neither comprehensive enough to assess reforms' effects nor easily retrieved. In the past, insurers' closed-claims files have proved to be comprehensive. Although such files were unavailable to us, state insurance commissioners, as part of their responsibilities for regulating the insurance industry, can require insurers to submit data.

GAO, at 74.[15]

4. *Landes and Posner*

The Landes and Posner study reviewed 359 reported decisions in product liability cases. Landes and Posner, *New Light on Punitive Damages*, 10 Reg. 33 (Sept./Oct. 1986). Punitive damages were allowed in only 2 percent of the cases. Landes and Posner, at 36. (The authors conducted a more limited review of "accident cases" and also found a 2 percent incidence of punitive damage awards, primarily in cases involving aggravating circumstances of gross negligence or recklessness). The study concluded:

> The data suggest — though they certainly do not show conclusively — that concern with the incidence of punitive-damage awards may be exaggerated. Other than in cases of intentional wrongdoing, these awards appear to be rare.

Landes and Posner, at 33.

In short, the above studies represent the universe of valid empirical evidence on punitive damages. Other purported "studies" must be viewed with great caution. Much of the rhetoric stems from pseudo studies propounded by advocates in the polemic. Typically, these take the form of nothing more than lists of cases, with a complete absence of information on how the study was conducted or on how the raw numbers translate into meaningful statistics on the incidence or rate of awards. Yet widespread dissemination of these spurious analyses has transformed the discourse on punitive damages.

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[15] The Texas State Board of Insurance undertook such a study of claim files in 1987 and found that punitive damages were awarded in only .6 percent of bodily injury claims and .2 percent of medical professional liability claims. Texas Liability Insurance Closed Claim Survey, at 32 (1987). The study further found that punitive damages were considered in the settlement of only 3.3 percent of the claims. *Id.* at 33.

III. THE DISTINGUISHING FEATURE OF THE CURRENT ERA OF CONTROVERSY IS THE ASCENDANCY OF THE ADVERSARIES OF PUNITIVE DAMAGES

In the long tradition of punitive damages, the most striking change in the current era of controversy is not in the amount or frequency of awards, or in the standards upon which the verdicts are based, or in the philosophical foundation of the doctrine. Instead, the distinguishing attribute of this era is the intensity — and success — of the adversaries of punitive damages.

The ABF study described the change as follows:

> The debate over punitive damages, and civil justice in general, has changed in an important and troubling way. It became politicized in the 1980s as a part of an intense, well-organized, and well-financed political agenda that seeks fundamental change in the civil justice system .... Sponsoring and directing the fight are interests which will benefit by the changes sought. In short, the debate over punitive damages has moved from the legal arena to a political one.
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> The debate over punitive damages (as the debate over civil justice generally) has become more emotional, more manipulative, and less reasoned as a result of the reformers' efforts to develop public awareness and support for their political cause.

ABF 1990, at 10, 12.

That the rhetoric of controversy has become embedded in the national consciousness is a tribute not to the truth but to the power and influence of the well-funded interests seeking to destroy a legal doctrine which exacts accountability for acts of willful misconduct.

For example, in this case the Pharmaceutical Manufacturers Association ("PMA") raises an outcry about "the recent explosion in punitive damage liability" which it claims "is compromising the industry's research efforts."

Amicus Brief of the Pharmaceutical Manfacturers Association and the American Medical Association, at 2. Yet there is no mention in the PMA brief of the empirical evidence that the incidence of punitive damage awards in personal injury actions is, to quote RAND, "quite small." Nor is there mention of the extraordinary profits of the pharmaceutical industry, which rose 18 percent last year and which over the last 10 years have placed the industry as one of the most profitable in the country. Forbes, Jan. 8, 1990, at 180.[16] Nor is there mention of the recent boasts of the PMA itself that, contrary to its claims before this Court, the "U.S. Leads in Discovery of 'World Class' Drugs." The Washington Post, March 14, 1990, at 16 (PMA advertisment).

Similarly, an amicus brief filed by the asbestos industry assails punitive damages for their role in pushing asbestos producers into bankruptcy. Amicus Brief for the Center for Claims Resolutions. Yet it is exposure to compensatory damages — brought about through decades of outrageous misconduct in willful indifference to the health of millions of Americans — which is largely responsible for the fate of this industry. *Fischer v. Johns-Manville Corp.*, 472 A.2d 377, 586 (N.J.Super. 1984), *aff'd*, 512 A.2d 466 (N.J. 1986); *see also* P. Brodeur, Outrageous Misconduct: The Asbestos

[16] The drug companies had a 10-year average return on equity of 20.1 percent, which was the fifth-highest return in the 70 industry groups analyzed. *Id.* at 246.

Industry on Trial (1985).[17]

The efforts of these powerful interests have had their effect. For example, 27 states passed some form of legislation affecting punitive damages between the years 1986 and 1989. ABF 1990, at 3 n. 10. And the perception of crisis —created out of whole cloth — has become accepted as fact in even the highest levels of the body politic.

In fact, however, the best available empirical studies indicate that punitive damages are awarded in only a small fraction of cases and that the median punitive damages award is quite modest. This Court should not alter a long-standing tradition of state common law in response to a "crisis" which simply does not exist.

[17] In *Fischer*, the court rejected the argument that the asbestos industry should be shielded from multiple awards of punitive damages, stating:

> [W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages.

472 A.2d at 585-86 (citation omitted).

CONCLUSION

The judgment of the Supreme Court of Alabama should be affirmed.

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Respectfully submitted,

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